NO. 21517

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JERRY WARREN GROSHART,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

EDWIN L. MILLER, JR.,
United States Attorney,

PHILLIP W. JOHNSON,
Assistant U. S. Attorney,

325 West "F" Street
San Diego, California 92101

Attorneys for Appellee,
United States of America.

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TOPICAL INDEX

TABLE OF AUTHORITIES

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I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in three counts of a four-count indictment, at the conclusion of trial by jury.

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 2, 545, and 3231, and Title 21, United States Code, Section 176a. Jurisdiction of this Court rests pursuant to Title 28, United States Code,

Sections 1291 and 1294.

II

STATEMENT OF THE CASE

Appellant was charged in three counts of a four-count indictment returned by the Federal Grand Jury for the Southern District of California. Co-defendent Jean Ellen Zeidler was charged in all four counts [C.T.2-5].[1/]

Count One charged that appellant, with intent to defraud the United States, knowingly smuggled and clandestinely introduced approximately 65 pounds of marihuana into the United States from Mexico, and that defendant Zeidler knowingly aided, abetted, counseled, induced, and procured the commission of that offense [C.T. 2].

Count Two charged that appellant and defendant Zeidler, with intent to defraud the United States, knowingly concealed, and facilitated the transportation and concealment of, approximately 65 pounds of marihuana, which marihuana, as they then and there well knew, had been imported and brought into the United States contrary to law [C.T. 3].

Count Three charged that appellant and defendant Zeidler, with intent to defraud the United States, knowingly and wilfully smuggled, and clandestinely introduced into the United States from Mexico, approximately 1,000 amphetamine tablets and 1,030 Seconal capsules, which merchandise should have been invoiced, etc. [C.T.4].

Count Four charged defendant Zeidler with a false claim of American citizenship [C.T. 5].

1/ "C.T." refers to the Clerk's Transcript of Record.

Jury trial of both defendants commenced on August 23, 1966, before United States District Judge Fred Kunzel [C.T. 26]. The Court granted defendant Zeidler's motion for judgment of acquittal as to Counts One, Two, and Three. Appellant was found guilty as charged on August 24, 1966. Defendant Zeidler was found guilty as charged in Count Four upon the same date [C.T. 24, 29-30].

Thereafter, on September 23, 1966, appellant was sentenced to the custody of the Attorney General for five years upon each count, to run concurrently [C.T. 35]. He filed a timely notice of appeal [C.T. 32].

III

ERROR SPECIFIED

Appellant specifies only one alleged error upon appeal:

> "The only error specified on this appeal is that a portion of defendant's custodial statement to the interrogating officers was admitted, although the inculpatory portion of the statement was considerably inadmissible as being secured in violation of the defendant's rights under the Fifth Amendment to the United States Constitution."
>
> (Appellant's Brief, p. 4).

IV

STATEMENT OF THE FACTS

On April 10, 1966, appellant Groshart arrived at the San Ysidro Port of Entry in San Diego County. He was driving a 1950 Plymouth station wagon. Jean Zeidler was a passenger. The vehicle arrived at a point a few yards on

the American side of the international border with Mexico [R.T. 27-30, 33-34].[2/]

Both occupants declared that they were American citizens. Miss Zeidler actually was not a citizen of the United States. They declared some merchandise to an Immigration officer but did not declare any marihuana, amphetamine, or Seconal [R.T. 27, 29-30, 163].

In a search of a portion of the vehicle, a number of packages were found in the tire well. The vehicle was taken from the primary inspection lane to the secondary area, where additional search resulted in the removal of 16 packages and two plastic jars from the tire well. Sixteen additional packages were found within side panels of the vehicle. These items were not visible without removing the top of the tire well or the side panels [R.T. 31, 46, 57-58, 63-64, 85].

A chemist testified concerning his qualifications as an expert and testified that samples from the packages consisted of marihuana and that the other items included amphetamine and Seconal [R.T. 89-90, 93-97]. There was testimony relating to the chain of possession of the contraband [R.T. 33, 58-62, 64-65, 74-75, 77-79, 81-82, 88-92, 96, 103].

The marihuana had a selling price value of approximately $1920 in Tijuana, Mexico.[3/]

The vehicle was registered to Gary Peter Sutelu [R.T. 84-85].

2/ "R.T." refers to the Reporter's Transcript.

3/ This figure is based upon testimony to the effect that the price was about $60 per kilo with each of the 32 "bricks" weighing one kilo [R.T. 68, 72, 81].

Appellant Groshart confessed, admitting that a man named "John" had asked him to drive the Plymouth station wagon to Mexico for the purpose of picking up a load of marihuana. The confession was not received in evidence although certain portions of it, which consisted of impeachment material, were heard by the jury [R.T. 132-33, 159-60, 167-68].

Appellant Groshart testified that he lived in the San Jose area at the time of the alleged offense; that he asked one "Dick Long" whether he could borrow "Long's" vehicle in order to take a trip to Tijuana; that "Long" agreed to this; that "Long" later changed his mind and refused to let appellant use the vehicle; and that "Long" said that he, "Long," could borrow a car from a friend in Santa Cruz "'on the pretense of going surfing or something.'" [R.T. 113, 116-18].

He also testified that the friend in Santa Cruz was Gary Sutelu; that the vehicle was borrowed from Sutelu; that he, appellant, has never seen Sutelu; that he drove to Tijuana with Jean; that they left the car in Tijuana; that they were away from the car for approximately ten hours (returning once to drop parcels off, and leaving again); that he believed that the car was not locked; and that he did not know that the contraband was in the vehicle [R.T. 118-21].

Evidence relating to statements made by appellant after his arrest was initially heard outside of the presence of the jury [R.T. 63, 135]. Customs Agent Thomas R. Donalson testified that he advised appellant that he did not have to make any statement and that any statement that he made could be used against him and that "he had a right to get an attorney any

time he wanted one." [R.T. 76-77, 137-38].

No threats or promises were made during the conversation. Appellant "very readily" provided the information to Agent Donalson [R.T. 142]. However, he stated that he did not wish to assist the Government in apprehending anyone else [R.T. 146].

Certain portions of appellant's statements were received in evidence in the jury trial itself. The jurors were instructed that the statements were admissible only upon the question of the credibility of the witness and not to establish the truth of the statements made [R.T. 159-60, 198]. Agent Donalson testified that appellant had stated that he had received the Plymouth station wagon from one "John" on April 9 and that he drove to Mexico with Miss Zeidler and parked the vehicle near a park in Tijuana, leaving it there for approximately four hours [R.T. 167-68].

Appellant admitted that he had told the officers that he was contacted in San Jose, California, on April 8, by a person identified by him only as "John" and that "John" asked him to drive the Plymouth station wagon to Mexico [R.T. 159-60].

V

ARGUMENT

A. TESTIMONY CONCERNING APPELLANT'S STATEMENTS TO THE OFFICERS DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS.

Appellant contends that testimony regarding his statement to the officers was erroneously received in evidence because the statement was

allegedly obtained in violation of the Fifth Amendment to the United States Constitution. Appellant bases his argument upon the rule announced in Miranda v. Arizona, 384 U. S. 436 (1966).

Appellant states that Agent Donalson did not sufficiently inform him of his Constitutional rights before questioning him. Agent Donalson advised appellant that he did not have to make any statement, that any statement that he made could be used against him, and that "he had a right to get an attorney any time he wanted one." [R.T. 137-38].

Not having had "fair notice" [4/] of the unannounced formula later required by Miranda, a subsequent decision, Agent Donalson did not advise appellant that if he was indigent, an attorney would be appointed to represent him. (Since appellant had retained counsel in the San Diego trial [C.T. 31] he apparently was not indigent at that time).

Appellant's confession was not received in evidence. However, certain portions of the statement were received in evidence after appellant testified in contradiction to those portions.

In Walder v. United States, 347 U. S. 62 (1954), the United States Supreme Court ruled upon the question whether illegally-seized evidence could be properly received in evidence against a defendant who voluntarily presents perjurious testimony extending beyond a mere claim of innocence. The question was answered in the affirmative:

4/ Johnson v. New Jersey, 384 U. S. 719, 732 (1966).

"It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the Weeks doctrine would be a perversion of the Fourth Amendment." Walder, supra, at p. 65.

Upon direct examination, appellant not only claimed innocence but also embellished the story by providing an involved account of the means by which he obtained possession of the automobile involved in the case. He testified that the vehicle was obtained from Gary Sutelu by false pretenses because appellant wanted a vehicle for the purpose of maing a trip to Tijuana. He indicated that "Dick Long" obtained the vehicle from Sutelu because "Long" had broken his promise to let appellant use "Long's" vehicle on the trip. He also testified that he was away from the vehicle for approximately ten hours in Tijuana, returning once during that period to drop parcels off and leaving again [R.T. 116-19, 121].

However, he had told Agent Donalson that he was contacted by one "John," who asked him to drive the vehicle to Mexico; that he received the vehicle from "John" on the following day; and that he left the vehicle in Mexico for approximately four hours [R.T. 159-60, 167-68]. The testimony concerning these statements (and a few other innocuous details) constitutes the evidence that is questioned by appellant in this appeal.

The jurors were instructed that the statements were admissible only upon the question of the credibility of appellant and not to establish the truth of the statements made [R.T. 198].

It is respectfully submitted that the statements were properly received in evidence under the Walder doctrine. However, appellant seeks to distinguish Walder upon the ground that Walder involves Fourth Amendment rights, while Miranda is concerned with Fifth Amendment rights.

(Appellant's Brief, p. 12).

There does not appear to be any reason for allowing defendants freer reign to commit perjury in cases involving Fourth Amendment violations than in cases involving unintentional Fifth Amendment self-incrimination violations. A Walder doctrine which blocks the road to "a perversion of the Fourth Amendment" [5/] would also have a value in other cases involving other Amendments. This view is supported by precedent as well as logic.

In United States v. Mullings, 364 F. 2d 173 (2nd Cir. 1966), the Court of Appeals considered the Miranda rule in connection with a claim that the defendant was not correctly informed of his legal rights and added (at p. 176, n. 3) that the defendant's statement could have been received under the Walder doctrine if the defendant had taken the stand and testified in contradiction.

Other decisions have strongly implied that the Walder doctrine applies to statements obtained in violation of the Miranda formula or an analogous violation of the rule set forth in Escobedo v. Illinois, 378 U. S. 478 (1964).

5/ Walder, supra, at p. 65.

United States v. Accardi, 342 F. 2d 697, 701 (2nd Cir. 1965), cert. denied, 382 U. S. 954 (1965) (alternative argument involving Escobedo question);

Fernandez v. Delgado, 257 Fed. Supp. 673 (D. C. Puerto Rico 1966) (alternative holding).

In United States v. Curry, 358 F. 2d 904 (2nd Cir. 1965), cert. denied, 385 U. S. 873 (1966), appellant Curry contended that his statements were obtained in violation of his Sixth Amendment right to counsel (apparently because he was not provided with counsel when the request was made, in violation of the Escobedo doctrine). He contended that the Walder rule does not apply when evidence is excluded because unconstitutionally obtained. The Second Circuit rejected this contention, noting that exclusion of the impeaching testimony upon rebuttal "would be an unnecessary impediment to the search for truth." (at p. 911).

In view of the fact that the Walder doctrine applies to the Fourth Amendment, applies to the Sixth Amendment (Curry, supra), and applies to the McNabb-Mallory doctrine, [6/] there is no reason to conclude that it does not apply to a Fifth Amendment situation which is closely related to the Sixth Amendment question decided in Curry, supra.

Appellant quotes language in Miranda to the effect that unless the suspect is informed of his rights, "no evidence obtained as a result of interrogation can be used against him."

Miranda, supra, at p. 479.

6/ Tate v. United States, 283 F.2d 377, 380-81 (C.A.D.C.1960).

However, it is respectfully submitted that the quoted language does not bar an exception to the Miranda rule any more than the following general language prevented the Walder exception to the general rule:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all."
>
> Silverthorne Lumber Co. v. United States, 251 U. S. 385, 392 (1920)

This broad language did not prevent the birth of the Walder doctrine.

Appellant suggests that the trial Court admitted the statements under the erroneous assumption that they were merely exculpatory rather than inculpatory. Appellee agrees that the same rule applies, regardless of whether the statements are exculpatory or inculpatory. The issue is not whether they were inculpatory, but whether they fall within the scope of the Walder doctrine. This doctrine includes damaging admissions:

> "But the Supreme Court in Walder did not suggest that impeaching evidence is to be excluded because it is damaging; there is little point for prosecutors to offer, or courts to allow, impeaching evidence unless it has some relevance to credibility."
>
> Tate v. United States, supra, 283 F. 2d 377, 380.

Appellant also suggests that he was not properly impeached in regard to statements that he allegedly did not recall making. This argument is apparently based upon the theory that a party may destroy an opposing party's impeachment evidence by merely claiming a lapse of memory. The law does not support such an unjust and unreasonable proposition.

Williamson v. United States, 310 F. 2d 192, 198-99 (9th Cir. 1962)

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgmen of the Court below should be affirmed.

Respectfully submitted,

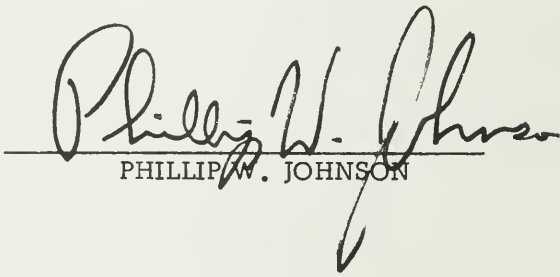
EDWIN L. MILLER, JR.,
United States Attorney,

PHILLIP W. JOHNSON,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



PHILLIP W. JOHNSON